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IN THE

SUPREME COURT

OF THE UNITED STATES

RICHARD C. RÔLES,

Petitioner

vs.

HUGH EARLE, COLLECTOR OF INTERNAL REVENUE for the DISTRICT OF OREGON, and THE UNITED STATES OF AMERICA,

Respondent

BRIEF IN SUPPORT OF WRIT OF CERTIORARI

JURISDICTION

Jurisdiction of this Court is based on Title 28, Section 1254 (1) USCA (June 25, 1948, C 646 § 1, 62 Stat, 928), as follows:

> "Cases in courts of appeals may be reviewed by the following methods:

(1) By writ of certiorari granted upon the petition of any part to any civil or criminal case before or after rendition of judgment or Decree;"

STATEMENT OF THE CASE

Plaintiff brought an action in the District Court of the District of Oregon against Hugh Earle, Collector of Internal Revenue, and the United States of America for recovery of $24,365.17, which he alleged was erroneously assessed and collected. (R. 3)

Plaintiff filed a written request for trial by jury of all issues triable by jury. (R. 30)

The issues were stipulated and a jury trial was had resulting in a verdict for plaintiff on special findings, as to plaintiff's total claim. (R. 37)

The court erroneously severed plaintiff's claim holding that $18,111.37 of plaintiff's claim was a claim against the United States as to which plaintiff did not have the right to trial by jury. (R. 50)

As to this part of plaintiff's claim, the court held that it was in excess of $10,000.00 and was collected by a former collector and hence was a

claim against the United States and not against the defendant Collector, and therefore not triable by a jury.

The court having overruled motion for new trial and judgment non obstante verdicto announced that it would determine the facts contrary to the jury verdict as to the portion of plaintiff's claim it held to be against the United States and ordered findings of fact and conclusions of law to be prepared. (R. 50)

Plaintiff moved to withhold findings, conclusions and judgment on the ground, inter alia, that the court did not have jurisdiction as it was not a claim against the United States, and moved for judgment in favor of plaintiff and against the Collector on the jury verdict. (R. 51 and 191)

This motion was denied and findings and conclusions were entered. (Tr. R. p. 52 and 195)

Plaintiff moved to vacate the same on the grounds previously urged. (R. 61)

The motion was denied. (R. 63)

Plaintiff then petitioned the United States Court of Appeals for the 9th Circuit for leave to file a petition for writ of mandamus to compel entry of judgment which petition was denied on the ground that plaintiff had an adequate remedy by appeal. *Roles v. Solomon,* Misc. No. 210 US Ct. of Appeals for Ninth Circuit, June 8, 1951.

Thereafter, plaintiff appealed from the judgment of dismissal in favor of the United States pointing out that the judgment of dismissal as to the United States was proper for lack of jurisdiction, but was improper on findings of fact and conclusions of law, since the court did not have jurisdiction to determine the matter as a claim against the the United States. (R. 70)

The appellate court entered its opinion in which it held that the trial court did not have jurisdiction to determine the matter as a claim against the United States, but held it had no jurisdiction to do more than affirm the judgment of dismissal as to the United States, and that it had no jurisdiction to reverse or remand to the lower court or to enter judgment against the collector although the complete record was before it.

Plaintiff moved for rehearing claiming the Court had jurisdiction and was required to reverse where the judgment appealed from was on the merits and where it affirmed a void judgment as to part of plaintiff's claim adversely to plaintiff it deprived plaintiff of the right to trial by jury which he had demanded. (R218 order denying)

ARGUMENT

1. WAS THE COURT OF APPEALS REQUIRED TO REVERSE A JUDGMENT WHICH DETERMINED A PART OF PLAINTIFF'S CLAIM, WHERE THE APPELLATE COURT HELD THAT THE TRIAL COURT HAD NO JURISDICTION TO DETERMINE THAT PORTION OF PLAINTIFF'S CLAIM ON THE MERITS, AND DID THE APPELLATE COURT HAVE JURISDICTION TO ENTER THE PROPER JUDGMENT OR TO ORDER THE LOWER COURT TO ENTER THE PROPER JUDGMENT ON THE JURY VERDICT WHEN THE COMPLETE RECORD WAS BEFORE IT, PARTICULARLY WHERE THE DISTINCTION BETWEEN THE COLLECTOR OF INTERNAL REVENUE AND THE UNITED STATES IS PURELY FICTIONAL?

The refusal to reverse and to enter a proper decree is a novel departure from accustomed procedure. Petitioner finds no authority which is factually identical.

Petitioner contends that the appellate court's holding decided a Federal question of procedure in conflict with the decisions of this court, and that the appellate court has in this respect so far departed from normal judicial proceedings as to call for this court's powers of supervision.

We shall first call attention to the jurisdictional statute relating to appellate courts:

Title 28, Section 2106, USC provides:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside, or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct entry of such appropriate judgment, decree or order or require such further proceedings to be had as may be just under the circumstances."

Thus the court by statute, has the jurisdiction to remand with directions for entry of proper judgment or for further proceedings unless the judg-

ment appealed from is not "lawfully brought before it for review" as provided by statute.

There would seem to be little doubt of the fact that the judgment appealed from was lawfully before the court and that each matter determined by the judgment was likewise before the court.

The judgment appealed from was a dismissal as to the United States but it was also a determination of $18,111.37 of plaintiff's claim on the merits.

> "It has been held that the appellate court will so far take cognizance of the void entry AS TO REVERSE IT and restore the parties to the position they originally occupied."
>
> 2 Am. Jur. 870 Sect. 36, citing *Alexander v. Crollot,* 199 U. S. 580; *Baker vs. Power,* 124 U. S. 167, *Wilson vs. Daniel,* 3 U. S. 401.

Plaintiff requested in his reply brief on appeal.

> "The judgment appealed from should be reversed." (R. . .) not included in record

And again in plaintiff's brief on petition for rehearing.

> "The judgment should be reversed with directions." (R. . .) not included in record.

The court refused to reverse or direct.

It should also be noted that plaintiff moved to vacate the void judgment of March 26, 1951 (R. 61) and that this motion was denied and that plaintiff appealed from that order as well as from the void judgment, (R. 70) but still the appellate court has refused to reverse, (R. . .), although it has recognized that the March 26, 1951, judgment is void as a determination of the merits of a portion of plaintiff's claim.

Where the court severs the claim of plaintiff into two separate causes of action, then each of those separate causes should be treated as though separate actions were filed as to each cause.

Thus when the causes were split, plaintiff filed a cause of action against the collector and the United States for $6253.81 and filed a cause of action against the collector and the United States for $18,111.37, (making plaintiff's total claim of $24,365.11).

When thus properly analyzed the judgment entered on January 2, 1951, in favor of plaintiff and against the collector for $6253.81 was a holding that the United States was not responsible for that

amount and the collector was both liable and responsible therefor. This was a correct determination from which no appeal would lie.

On the other hand when a judgment was entered in favor of the United States and findings and conclusions were entered on March 26, 1951, holding that the United States was responsible but not liable it was a determination that the collector was neither responsible nor liable, although the exact reverse was true.

When plaintiff appealed from the March 26, 1951, judgment both the collector and the United States were named in the notice of appeal and made parties thereto. When the appellate court determined that the plaintiff's claim was against the collector instead of the United States, it was then required to reverse for further determination of plaintiff's claim against the collector as to the $18,111.37 since he was a party to the severed cause of action.

In this connection, we call the court's attention to the fact that this court has held that except where required by statute the distinction between the col-

lector and the United States is purely fictional and should not be set up as a defense to deprive plaintiff of his statutory and constitutional right to trial by jury. The court of appeals has by its opinion held contrary to the case of *Moore Ice Cream Co. vs. Rose,* 289 U. S. 373.

If the cause was not reversed, plaintiff would be deprived of his constitutional right of trial by jury when he had demanded the same and he would also be deprived of his right to review since there would be no judgment of any kind as to his claim of $18,111.37 from which plaintiff could appeal.

> "A party aggrieved by a judgment cannot be deprived of a right of review given him by statutory or constitutional provision by any act or restriction of the court." 3 Am. Jur. 919, Sec. 201.

It will thus be seen that the court had the judgment of March 26 properly before it for consideration under the jurisdictional statute and the judgment of January 2, 1951 was not necessary or even incidental to its reversal of the judgment appealed from.

2 (a) DID THE COURT OF APPEALS HAVE THE RIGHT TO DETERMINE THE EFFECT AND INTENT OF A JUDGMENT NOT BROUGHT BEFORE IT FOR REVIEW.

Where the record is complete and is before the court the court may order the entry of a proper judgment of its own motion or may reverse with directions to enter the proper judgment. (*Wabash Rwy. Co. vs. Public Service Comm.*, 273 US 47; *Green vs. Obergfell*, 121 F. 2d 46, 73 App. D.C. 298.)

However, the Court of Appeals has held that the judgment of January 2, 1951 was not before it and plaintiff points out that if the judgment was not properly before the appellate court, it would have no jurisdiction to interpret its effect or intent and would have no jurisdiction to determine its finality.

2. (b) WAS THE JUDGMENT OF JANUARY 2, 1951, IF PROPERLY BEFORE THE APPELLATE COURT, A FINAL JUDGMENT FROM WHICH PLAINTIFF COULD APPEAL, ABSENT A DETERMINATION BY THE COURT THAT THERE WAS NO JUST REASON FOR DELAY AND NO EX-

PRESS DETERMINATION FOR ENTRY OF JUDGMENT UNDER RULE 54 B OF THE RULES OF CIVIL PROCEDURE.

Petitioner particularly calls this Court's attention to the error in which it is believed the court of appeals has fallen.

The Circuit Court has in effect based its determination of the controversy between the parties on the January 2nd judgment and has thus failed to make a complete determination of plaintiff's entire claim or controversy.

The question of finality of a judgment under Rule 54B, Rules of Civil Procedure is not dependent *on the parties concluded by that judgment* as the Court of Appeals indicates, but is entirely dependent on whether plaintiff's entire claim has been completely determined and adjudicated.

The court of appeals for the second circuit in considering the question in the case of *Clark vs. Taylor*, 163 F2d. 940 had this to say:

> "A transaction or occurrence is the subject matter of the claim rather than the legal rights arising therefrom; additions to or subtractions

from the central core of fact do not change the substantial identity so as to support piece meal appeals."

See also *Republic of China vs. American Express Co.*, 190 F. 2d 334.

In the present case if the second judgment of March 26, 1951 is void as the Court of Appeals holds that it is; and if plaintiff has a claim of $18,111.37 against the collector which the trial court erroneously determined to be a claim against the United States as the Court of Appeals agree that he has; and if the judgment of January 2, 1951 was a final judgment as to the collector's liability as the court of appeals holds it to be, then what happened to plaintiff's claim of $18,111.37? It can not have vanished into the heavens for the parties stipulated the amounts.

Can it be that plaintiff can have a claim stipulated as to amount ($24,365.17); brought against the proper party (the collector) and held to be properly so brought by the appellate court; have a jury verdict in his favor as to the erroneous collection thereof, and yet be deprived of $18,111.37 of that same claim?

The Court of Appeals has apparently held this to be proper because they say plaintiff should have appealed from the judgment of January 2, 1951, yet that same Court agrees that plaintiff has an additional claim for $18,111.37 which is not determined by that judgment but at the same time holds that the judgment for $6253.81 was a final judgment.

We can not under any theory find any method of harmonizing this view where it is the disposition of plaintiff's entire claim which determines finality and not the liability of any one party.

If the lower court had intended the judgment for $6253.81 to be a final determination of plaintiff's claim, then how could it have entered findings of fact as to the balance of plaintiff's claim in favor of the United States as to the $18,111.37 amount?

CONCLUSION

Plaintiff submits:

1. The Court of Appeals has failed to follow this court's holding in the case of *Moore Ice Cream Co. v. Rose,* supra, where this Court has held the distinction between the Collector and the United

States is pure fiction in tax refund matters.

2. The Court of Appeals has construed the effect of a judgment not before it on appeal, but additionally has construed such judgment to be appealable as a final judgment when it could not under any theory, be final as a disposition of plaintiff's entire claim, thus holding directly in conflict with the decisions of other circuits.

3. The Court of appeals has rendered a decision on a Federal question of procedure in conflict with this Court's decision where this court has held that where the entire record is before the appellate court, it should take such action as is proper in respect thereto rather than to send the case back to the trial court. In this case, the Court of Appeals has refused to either enter the proper order or send the cause back for a further determination.

4. The Court of Appeals has thus departed from the accepted and usual course of judicial procedure and has sanctioned a departure from the accepted procedure by the lower court in permitting the lower court to split plaintiff's cause of action (er-

roneously) for the purpose of deciding a factual question by the court contrary to the jury verdict and without jurisdiction so to do.

Certiorari should issue to the Court of Appeals for the Ninth Circuit in order that the matter may receive a full determination by this Court resolving the procedure.

Respectfully submitted,

THOMAS L. GATCH
WARDE H. ERWIN

BOYD, FERRIS & ERWIN

DAVID S. PATTULLO

Attorneys for Petitioner

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 72

R. C. ROLES, PETITIONER

v.

HUGH EARLE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF OREGON, AND THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (R. 210-217) is reported at 195 F. 2d 346.

JURISDICTION

The judgment (R. 217-218) of the Court of Appeals was entered March 24, 1952. The order denying petition for rehearing was entered April 15, 1952. (R. 218.) The petition for certiorari

was filed May 19, 1952. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. The District Court entered two separate judgments herein: one against the Collector and one in favor of the United States. Did the Court of Appeals, upon petitioner's appeal from the judgment in favor of the United States, have jurisdiction to review the judgment in favor of the petitioner against the Collector, from which no appeal was taken?

2. Did petitioner's appeal from the denial of his motion to set aside the judgment in favor of the United States and to increase the prior judgment in his favor against the Collector, give the Court of Appeals jurisdiction to review the judgment against the Collector, although no appeal from that judgment had been taken?

3. Even if the Court of Appeals had jurisdiction upon such appeal to review the judgment against the Collector, did the District Court have jurisdiction of a suit against the Collector for an amount paid over to a former Collector to be held in a suspense account which was applied by the Commissioner to the petitioner's liability for taxes after the present Collector had entered office?

STATUTE INVOLVED

28 U.S.C.:

§ 1340. *Internal revenue; customs duties*

The district courts shall have original jurisdiction of any civil action arising under any

Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court.

§ 1346 [As amended by Section 80, Act of May 24, 1949, c. 139, 63 Stat. 89]. *United States as defendant*

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws, (i) if the claim does not exceed $10,000 or (ii) even if the claim exceeds $10,000 if the collector of internal revenue by whom such tax, penalty or sum was collected is dead or is not in office as collector of internal revenue when such action is commenced;

* * * * *

§ 2402. *Jury trial denied in actions against United States*

Any action against the United States under section 1346 of this title shall be tried by the court without a jury.

STATEMENT

This is a suit brought in a Federal District Court to recover income taxes for the years 1944, 1945 and 1946, allegedly overpaid in the total sum of $24,365.18. It was instituted against both Hugh Earle, Collector of Internal Revenue for the District of Oregon, and the United States of America. (R. 3-27.) After issue was duly joined by answer (R. 27-30), petitioner filed a demand for trial by jury of the issues joined (the *bona fides* of two alleged partnerships), under Rule 38 of the Federal Rules of Civil Procedure.

The pre-trial order (R. 31-37) filed herein shows that among other things the following matters were admitted: That the Collector Earle, to whom $6,253.81 of the tax sought to be recovered was paid, was at the time of payment of the sum and now is the duly acting Collector of Internal Revenue; that the Collector of Internal Revenue to whom $18,111.37 of the tax sought to be recovered was paid was at the time of the commencement of this action not in office; that this sum was paid to the former Collector for holding in suspense and without application to tax liability (R. 31-32); and that thereafter, on February 16, 1949, the sum was applied by the Commissioner against additional taxes assessed against the petitioner (R. 32-33). In the pre-trial order the parties agreed to have the case tried before the court without a jury as to the claim against the United States. (R. 36.)[1]

[1] This was necessary because of 28 U.S.C., Section 2402, which provides that any action against the United States for the recovery of any internal revenue tax brought under Section 1346 of that title shall be tried by the court without a jury.

The case was tried to the jury as to the claim against the Collector Earle. The jury rendered a special verdict against the Collector, and on January 2, 1951, the District Court entered judgment on the verdict for the petitioner and against the Collector Earle in the sum of $6,253.81, with interest. (R. 39-41.) The petitioner has not appealed from this judgment.

The claim for refund of the balance, $18,111.37, which petitioner had paid in the manner above stated to the Collector who was not in office at the time the action was commenced, was at that time, and at the time of the trial, regarded by the parties, as well as by the District Court, as a claim against the United States, and was tried to the court without a jury pursuant to stipulation (R. 197-198), and the pre-trial order entered thereon (R. 36). The petitioner submitted proposed findings of fact in connection with his case against the United States (R. 192), and moved for judgment in his favor and against the United States, "as prayed for in plaintiff's complaint and as shown by the pre-trial order on file herein" (R. 38).

On March 22, 1951, petitioner filed a motion to withhold proposed findings of fact and conclusions of law submitted by the United States and to withhold judgment thereon and to enter judgment in petitioner's favor against the United States. (R. 51-52.) The motion was orally denied (R. 194), and thereupon on March 26, 1951, the court made findings and entered judgment against petitioner and in favor of the United States (R. 60-61).

Thereafter the petitioner filed a motion to set aside these findings and judgment and for the entry of a judgment in favor of the petitioner against the Collector Earle in the sum of $18,111.37 on the ground that the court did not have jurisdiction to hear any claim against the United States. (R. 61-62.) The motion was denied April 9, 1951. (R. 63-64.)

Petitioner filed a notice of appeal from the judgment entered on March 26, 1951; from the order of March 26, 1951, overruling his motion for entry of judgment in favor of the petitioner and ordering entry of judgment in favor of the United States and overruling his objections and findings of fact and conclusions of law; and from the order entered April 9, 1951, overruling petitioner's motion to enter judgment in his favor and to set aside the judgment in favor of the United States. (R. 70-71.)

The Court of Appeals held that since the petitioner's notice of appeal made no mention of the judgment of the District Court of January 2, 1951, against Collector Earle, it was apparent that it was without jurisdiction to consider that judgment; that the only judgment brought before it for review was that entered by the District Court on March 26, 1951, dismissing the action against the United States on the merits (R. 212); and further, that petitioner's appeal from the order overruling his motion to set aside the March 26, 1951, judgment and to enter judgment in his favor for the full amount against the Collector had no such force and

effect as to cause the judgment of January 2, 1951, to merge with the March 26, 1951, judgment for purposes of appeal. (R. 213.) The Court of Appeals concluded that, since the petitioner had abandoned his original contention before the District Court that that court had jurisdiction to enter a judgment in his favor against the United States for $18,111.37, it would perhaps be justified in affirming the March 26, 1951, judgment on that ground. (R. 213.) However, the Court of Appeals deemed it advisable to decide for itself whether the District Court had jurisdiction against the United States in this action under 28 U.S.C., Section 1346(a)(1). (R. 213-214.) After holding that the trial court had no jurisdiction to entertain the action against the United States, it affirmed the judgment of dismissal entered March 26, 1951, on that ground. (R. 217.) [2]

ARGUMENT

I

The theory of the taxpayer's single action against Collector Earle, then in office, and the United States was that recovery could be had against the Collector

---

[2] We desire to call to the attention of the Court an error in the record which we believe will not be disputed by the petitioner. As a result of an obvious mistake, the opinion of United States District Judge Gus J. Soloman in another case, wholly unrelated to the instant one, was printed in the record and should therefore be disregarded here. The opinion referred to is set out on pp. 64-70, inclusive, starting below the line in the center of p. 64 and ending above the line in the center of p. 70.

of so much of the income taxes in question as had been paid to him, namely $6,253.81, and against the United States of the balance of $18,111.37, which had been collected by the prior Collector, Maloney. See *Powell* v. *United States,* 123 F. 2d 472 (C.A. 9th), wherein it was held that a Collector and the United States may be joined in one action for the recovery of taxes, but that a separate judgment should be entered against each. In any event, petitioner's demand for a jury trial required a severance. See 28 U.S.C., Section 2402, *supra,* p. 3, which provides that any action against the United States under 28 U.S.C., Section 1346, *supra,* p. 3 (a suit in a District Court for the recovery of any internal revenue tax) shall be tried by the court without a jury. Hence, it was agreed at the pre-trial conference to have the case tried before the court sitting without a jury as to the claim against the United States. This effected a severance into two separate and distinct causes of action—one against the Collector and the other against the United States. The action against the Collector is an action against him personally in the nature of a common law action for money had and received (*Sage* v. *United States,* 250 U.S. 33; *Smietanka* v. *Indiana Steel Co.,* 257 U.S. 1; *Union Trust Co.* v. *Wardell,* 258 U.S. 537; *Graham & Foster* v. *Goodcell,* 282 U.S. 409, 430; *Tait* v. *Western Md. Ry. Co.,* 289 U.S. 620), which may be brought in the District Court of the United States under 28 U.S.C., Section 1340, *supra,* pp. 2-3, and is triable to a jury. On the other hand, the action against the United

States is purely statutory, being authorized by 28 U.S.C., Section 1346(a)(1), *supra*, p. 3, Section 2402, *supra*, p. 3, providing, as stated, that it shall be tried by the court without a jury.

After severance, judgment was entered against the Collector upon a special verdict of a jury on January 2, 1951. The petitioner has never appealed from this judgment. His notice of appeal was limited to the judgment of March 26, 1951, and motions filed in connection therewith, yet what petitioner now seeks is an increase in the amount of the judgment against the Collector. The Court of Appeals was clearly correct in holding that the appeal from the judgment dismissing the action against the United States did not bring before it for review the judgment against the Collector.

II

A long line of cases supports the further holding of the Court of Appeals that the petitioner's appeal from the order overruling his motion to set aside the judgment in favor of the United States and to enter judgment for the full amount in suit against the Collector did not serve to bring the judgment against the Collector before it. *Donovan* v. *Jeffcott*, 147 F. 2d 198 (C.A. 9th); *Republic Supply Co. of California* v. *Richfield Oil Co.*, 74 F. 2d 909 (C.A. 9th); *Armstrong* v. *New La Paz Gold Mining Co.*, 107 F. 2d 453, 454 (C.A. 9th); *Nealon* v. *Hill*, 149 F. 2d 883, 885 (C.A. 9th), certiorari denied, 326 U.S. 753; *Bowers* v. *E. J. Rose Mfg. Co.*, 149 F. 2d 612 (C.A. 9th); *Hicks* v. *Bekins*

Moving & Storage Co., 115 F. 2d 406, 409 (C.A. 9th); *Libby, McNeill & Libby* v. *Malmskold,* 115 F. 2d 786 (C.A. 9th). See also *Ford Motor Co.* v. *Busam Motor Sales,* 185 F. 2d 531, 533-534 (C.A. 6th), and particularly *Bass* v. *Baltimore & O. Terminal R. Co.,* 142 F. 2d 779, 780 (C.A. 7th), where that court said that it must of its own motion notice the fact that there was no appeal from the judgment in the case, the appeal being only from the order of the court denying appellant's motion for a new trial, which was not subject to appeal, though reviewable for error of law on appeal from the final judgment. To the same effect is *Mosier* v. *Federal Reserve Bank of New York,* 132 F. 2d 710, 712 (C.A. 2d). In *United States* v. *Muschany,* 156 F. 2d 196, 197 (C.A. 8th), the court assimilated orders denying motions to vacate, amend or modify to orders denying motions for a new trial. As was said in *Wayne* v. *New York Life Ins. Co.,* 132 F. 2d 28 (C.A. 8th), by overruling the plaintiff's motion to vacate its final decision and entering a new one in its stead, the court merely reaffirmed the finality of the judgment as originally entered and plaintiff should have appealed from the judgment. Thus, in order for the petitioner to obtain on appeal the full relief which he sought by his motion it was necessary for him to have appealed not only from the judgment entered in favor of the United States, but from the judgment against Collector Earle, as well.

III

The decision of the Court of Appeals that the District Court did not have jurisdiction of the United States in the action to recover the $18,111.37 is questionable. That decision, however, was unnecessary, since, if the District Court did not have such jurisdiction, a judgment dismissing the suit against the United States on that ground could not form the basis for granting further relief to the petitioner against Collector Earle, any more than the judgment, which the District Court did enter, dismissing the suit against the United States on the merits. In this connection, it may be noted that the petitioner did not contend in the Court of Appeals, and does not contend here, that the District Court erred in concluding, on the merits of petitioner's claim, that he had failed to sustain the burden of proof. (R. 59).

In any event, there is no basis for the assumption, apparently made by petitioner, that the Court of Appeals held or would have held that the District Court could have rendered judgment against Collector Earle for this amount. To the contrary, the Court of Appeals held that it did not have jurisdiction to determine that question. Moreover, it is clear that Collector Earle was not liable for any amount greater than that for which judgment was rendered against him. Concededly he did not collect the $18,111.37 in question, and it has never come into his possession. This amount was paid to a former Collector and, though placed

in a suspense account, was actually deposited as an internal revenue collection to the credit of the Treasurer of the United States in the same manner as collections which are applied immediately to some account on the assessment list. See *Rosenman* v. *United States,* 323 U.S. 658, 660, and the same case below at 53 F. Supp. 722, 723 (C. Cls.). The application of the amount collected by the former Collector to the deficiency assessment was the act of the Commissioner, and not that of Collector Earle whose action in connection therewith was purely ministerial. In such circumstances, suit did not lie against Collector Earle for this amount. It is true that under the federal statutes the Collector is relieved from personal liability except in a case where the District Court is of the opinion that he acted without probable cause (*Sage* v. *United States, supra*), and that such suits against the Collector are commonly but a means of collecting the overpayment from the United States (*Moore Ice Cream Co.* v. *Rose,* 289 U.S. 373, 382). But no statute has enlarged the Collector's common law liability to include the item in question here; and his mere ministerial act of applying the amount in question to an assessment at the direction of the Commissioner could not subject him to personal liability. See *Lowe Bros. Co.* v. *United States,* 304 U.S. 302, 306.

CONCLUSION

The decision of the Court of Appeals that it had no jurisdiction to review the judgment entered against the Collector is clearly correct. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

ELLIS N. SLACK,
Acting Assistant Attorney General.

A. F. PRESCOTT,
CARLTON FOX,
Special Assistants to the Attorney General.

JUNE, 1952.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1952 211714 1948